

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

RICHMOND HEALTH CARE
d/b/a SUNRISE HEALTH AND
REHABILITATION CENTER

Employer

and

Cases 12-RC-8064
12-RC-8065

1115 FLORIDA DIVISION OF 1199,
SERVICE EMPLOYEES INTERNATIONAL
UNION¹

Petitioner

HEALTH CARE SERVICES GROUP, INC.

Employer

and

Case 12-RC-8066

1115 FLORIDA DIVISION OF 1199,
SERVICE EMPLOYEES INTERNATIONAL
UNION

Petitioner

DECISION ON REMAND

I. Introduction

This Decision on Remand concerns three bargaining units of employees employed by two different employers at the same health care facility. One of these units only is a unit of LPNs. The Petitioner was certified to represent each of these bargaining units on July 22, 1999. A number of previous decisions have been issued by the Region and the

¹ The caption has been amended to reflect the disaffiliation of the United Food and Commercial Workers from the AFL-CIO effective July 29, 2005.

Board concerning these three units.² Although it was decided that the cases should be re-evaluated due to the Supreme Court's decision in Kentucky River Community Care, Inc., 532 U.S. 706, 121 S. Ct. 1861 (2001), the Board specifically declined to revoke the Petitioner's certifications when it vacated its decisions in Cases 12-CA-20900 and 12-CA-20920 and reopened these representation cases, all in its unpublished Supplemental Decisions and Orders dated December 14, 2001.

The pending issue with respect to the LPN unit is whether or not the unit is an appropriate one, as all the LPNs are charge nurses, whom the Employers contend are statutory supervisors. The issue in the other two units is whether or not the fact that LPNs served as election observers for both the Petitioner and Employer Sunrise in the LPN unit requires that those other two elections be set aside if the LPNs are found to be supervisors.

The issues before me are narrow ones, based on the Board's decisions in Oakwood Health Care, Inc., 348 NLRB No. 37 (2006), Croft Metals, 348 NLRB No. 38 (2006), and Golden Crest Healthcare Center, 348 NLRB No. 39 (2006). As explained below, I find that the Board's new decisions do not warrant the conclusion that the LPNs are supervisors. Furthermore, even if the LPNs are supervisors, I would not set aside the elections in the other two units.

II. Background

On January 16, 2003, I issued a Supplemental Decision (SD) in these matters. In

² Three separate pre-election decisions and three separate post-election reports were issued by the Region, all of which were reviewed by the Board. Decisions and Amendments of Certification were issued by the Region on June 13, 2000, in all three units, in Cases 12-AC-37, 12-AC-38, and 12-AC-39. A supplemental decision issued by the Region dealt with all three units. See also related Cases 12-CA-20900, and 12-CA-20920 reported at 332 NLRB 1301 (2000) and 332 NLRB 1304 (2000), respectively, and the Board's unpublished supplemental decisions in those unfair labor practice cases dated December 14, 2001.

Case 12-RC-8065, I found that Employer Sunrise's licensed practical nurses (LPNs) were not supervisors within the meaning of Section 2(11) of the Act. I also found that the elections in Case 12-RC-8064 for Employer Sunrise's service employees³ and in Case 12-RC-8066 for Employer Health Care's laundry and housekeeping employees should not be set aside because LPNs served as election observers for the LPN unit. On April 9, 2003, the Board granted the Employers' Request for Review of the SD.

On September 30, 2006, the Board remanded these cases for further appropriate action consistent with the Board's holdings in Oakwood Health Care, Inc., 348 NLRB No. 37 (2006), Croft Metals, 348 NLRB No. 38 (2006), and Golden Crest Healthcare Center, 348 NLRB No. 39 (2006). The Board also ordered that the record be reopened, if necessary.

On October 26, 2006, the Union submitted a letter stating its position that reopening of the record was unnecessary and inappropriate, with supporting argument. On that same date, the Employers' attorney submitted a written request that the record be reopened, but did not set forth any reasons for this request.

On October 31, 2006, I issued an Order to Show Cause why the record should be reopened for the taking of additional evidence regarding the LPNs' supervisory status, including any changed circumstances bearing on their status. In addition, I asked the Parties to address the question of whether or not changed circumstances, if any, should be considered in view of the fact that the Union's Certifications of Representative in each of the three units had remained outstanding since 1999, and the fact that the Parties agreed prior to the issuance of the Regional Director's Supplemental Decision in 2003 that it was

³ The service employees include the following classifications: certified nursing assistants (CNAs), dietary workers, maintenance, central supply, medical record, activities, social service employees, and unit secretaries.

not necessary to reopen the record on these issues. The Parties were directed in the Order to Show Cause to address all issues with specificity. While the Union did not respond to the Order to Show Cause,⁴ on November 6, 2006, the Employers submitted a brief written response.

On November 21, 2006, I issued an Order Denying Request to Reopen the Record and Directing the Filing of Briefs. I relied upon the fact that the Employers failed to identify what evidence they intended to present if the record were reopened. With respect to changed circumstances, the Employers had noted that “the management structure for the Sunrise facility has changed in the 9 years since the Union election, including the Administrator and Director of Nursing positions,” apparently meaning that new persons at some point were placed in those positions. However, they did not set forth how this “change” would impact the analysis set forth by the Board or otherwise specifically address the issues raised in the Order to Show Cause. Thus, I determined that there had been no showing supporting the reopening of the record and that the Parties could fully explore the Board’s analysis set forth in its new cases, as it relates to the facts in these matters, in briefs.

On December 15, 2006, the Employers submitted a brief, and on December 18, 2006,⁵ the Union’s brief was received. Contrary to the Union, the Employers contend that the LPNs, who are the employees in the bargaining unit in Case 12-RC-8065, are statutory supervisors within the framework of the newly-issued Board cases, and that the

⁴ As noted in the Order to Show Cause, the Union had stated, by letter dated October 26, 2006, its position that reopening of the record was unnecessary and inappropriate.

⁵ The Union’s brief was due on December 15, 2006, but the brief was not received by the Regional Office, due to delivery issues, until December 18, 2006. Since the Union’s brief was postmarked on December 14th, I am accepting the brief as timely-submitted.

elections in Cases 12-RC-8064 and 12-RC-8066 were tainted because two LPNs served as election observers in the LPN unit.

I have considered the evidence and the arguments presented by the Parties on the issues. As discussed below, I have concluded that the Employers have failed to meet their burden of establishing that the LPNs are supervisors as defined in the Act.

In this Decision on Remand, I will not further discuss the procedural history in these cases mentioned above and in detail on pages 2-4 of the SD, or the description of Employer Sunrise's operations as set forth on page 5 of the SD.

I will address my conclusion that LPNs are not statutory supervisors within the meaning of Section 2(11) of the Act because they do not "assign" work to CNAs or "responsibly direct" the work of CNAs using "independent judgment". I will also address my conclusion that the elections in the laundry and housekeeping unit and service unit should not be set aside because LPNs served as the observers for the election in the LPN unit. Finally, I will present in detail the facts and reasoning that support each of my conclusions on the issues, within the framework of the recently-issued Board decisions.

III. Overview of LPN Position

LPNs have a role in deciding which CNA will perform which task by matching CNAs with similar skills to routine functions; assigning CNAs to perform discrete tasks based on a resident's needs; determining, if necessary and on a rotational or random basis, when CNAs will eat meals; and suggesting break times for CNAs. LPNs also have a role in transfers of employees to cover staffing needs, requesting that CNAs work overtime, and in the case of resident abuse, asking a CNA to clock out.

LPNs are responsible for providing resident care pursuant to an interdisciplinary care plan (ICP) provided for each resident by an interdisciplinary team. Federal and state laws require that each resident have an ICP. The ICP states a resident's needs, the goals for the resident, and the approach the facility is going to take to meet the resident's needs. The ICP is very specific and may state, for example, that a resident needs to be repositioned from left to right or that a resident needs a special mattress or adaptive equipment. The LPN communicates with the resident's doctor on a regular basis, and the LPN changes the ICP accordingly. According to Employer Sunrise's job description, LPNs are also responsible for supervising the day-to-day activities performed by the CNAs, and "such supervision must be in accordance with...federal, State, and local standards, guidelines and regulations that govern [the] facility, and as may be required by the [EDON]⁶ or Unit Manager to ensure the highest degree of quality care is maintained at all times." Each LPN is responsible for about 30 residents. The unit managers supervise the LPNs, coordinate all functions for the unit, and make rounds. Moreover, the unit managers hire, fire, evaluate, and review the work of the employees. Although the Employers argue that no other management staff other than LPNs are present in the facility on the evening and night shifts, it appears that unit managers are responsible for what happens on their assigned units 24 hours a day, while an LPN is responsible for providing resident care only on his or her shift. Moreover, the work hours of unit managers and LPNs may overlap the evening shift if the need arises.

The CNAs carry out the majority of the ICP, have the most contact with the residents, and report any incidents or changes in a resident's condition to the LPN. The CNAs perform routine and repetitive functions such as changing a resident's bed position

⁶ The EDON is the executive director of nurses.

or helping a resident with exercises. If a doctor modifies or changes the ICP, the LPN will direct the CNAs to perform duties and assignments based on the change or modification. The CNAs also make recommendations regarding changes to the ICP.

With respect to scheduling CNAs, Employer Sunrise has detailed policies and procedures. There are generally three to four CNAs working with an LPN. Employer Sunrise assigns CNAs permanently to a particular team in a specific district in the unit, and on a semi-permanent or permanent basis to a specific resident. A staffing coordinator is in charge of the overall assignment and scheduling of CNAs based in part upon recommendations by a Quality Care Assurance consultant. The unit manager reviews the schedule prepared by the staffing coordinator. CNAs generally call the staffing coordinator or shift supervisors when they are sick, and the staffing coordinator handles a request by a CNA for a day off. While LPNs can request additional CNAs or pool nurses⁷ to cover shortages, the staffing coordinator and shift supervisors generally handle these personnel matters. The record does not reflect whether there is an independent review of an LPN's request for a particular number of CNAs.

If an LPN needs a CNA to help on the Medicare Unit, she may assign a CNA who has the experience because the CNA worked on that unit. Similarly, if a CNA is needed to accompany a resident to a doctor's appointment away from the facility, the LPN, in conjunction with social services and/or the staffing coordinator, would initially ask for a volunteer or suggest a particular CNA who is familiar with those tasks. Regarding assigning CNAs to particular tasks, LPNs are responsible for ensuring that the CNAs on their unit comply with Employer Sunrise's emergency, infection control, and safety procedures, as well as ensuring that the CNAs carry out the ICP for each resident. LPNs

⁷ Pool nurses, also known as floaters, are CNAs willing to work extra hours.

make daily rounds in their unit, but as specified by the job description, report problem areas to the unit manager. If an LPN needs help with a particular resident, he or she will seek the assistance of the CNA assigned to that resident. The LPN may tell the CNA that she needs help, for example, in changing a resident's dressing, but those tasks are routine and repetitive. The record reflects that since CNAs generally have permanent assignments, they know their residents, and they have the skills to take care of their residents on their own.

The CNAs' lunch periods are predetermined by the lunchtime of the resident to whom the CNA is assigned or assigned randomly by the LPN rotating among the CNAs who work with the LPN. The residents' meal times do not usually change, absent a medically-necessary reason. Regarding breaks, the record reflects that while some LPNs may schedule break times, if a CNA is busy during the scheduled break time, the CNA chooses when to take her break.

With respect to transfers, although LPNs can decide among themselves to move CNAs already working at the facility to cover shortages that occur during their shift, unit managers and shift managers usually perform this task because LPNs are busy with resident care. On occasion, CNAs are permanently transferred to another unit. Although an LPN may make a recommendation to another LPN, the staffing coordinator or the unit manager for a CNA's permanent transfer, the staffing coordinator makes the final decision regarding the transfer. In this regard, the record reflects that LPNs' recommendations for such transfers are followed or adopted "*for the most part.*" This testimony indicates that the staffing coordinator makes an independent determination on

these matters, which is, at least some of the time, contrary to the recommendation of the LPN.

Regarding overtime, if an LPN needs a CNA to work overtime, the LPN must ask the staffing coordinator for permission. Moreover, if a CNA refuses to work overtime, the LPN must refer the problem to the unit manager or staffing coordinator.

If an LPN observes a CNA abusing a resident, the LPN would ask, but cannot force, the CNA to clock out. In this regard, an LPN testified that if she saw a CNA abusing a resident she would tell the CNA to stop working and report the matter to the unit manager, but the LPN stated that she did not have the authority to tell the CNA to clock out or fire her.

IV. LPNs Do Not Assign Work to CNAs Using Independent Judgment

In Oakwood, the Board defined “assign” as “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee. That is, the place, time, and work of the employee are part of his/her terms and conditions of employment.” Oakwood, slip op. at 4. Thus, “to ‘assign’ for purposes of Section 2(11) refers to the [charge nurse’s] designation of significant overall duties to an employee, not to the [charge nurse’s] ad hoc instruction that the employee perform a discrete task.” Id. Thus, designating an employee to regularly administer medications to a patient is an overall duty constituting an assignment, but ordering an employee to give a sedative to a patient is not. Id.

The record reflects that the LPNs do not “assign” CNAs to their places of work, do not assign CNAs to their times of employment, and do not assign CNAs to their

overall duties, as defined by the Board in Oakwood. In contrast to Oakwood, where the Board noted that “[i]n the health care industry, the term ‘assign’ encompasses the [charge nurse’s] responsibility to assign nurses to particular patients,” slip op. at 4, the CNAs generally have permanent assignments to particular residents, and their schedules are determined by the staffing coordinator, unit manager, and Quality Care Assurance consultant. In addition, while an LPN may change the ICP based upon a resident’s current condition, this is based upon the LPNs’ constant contact with a resident’s doctor. For example, when a resident has a sore, the LPN notifies the resident’s doctor and prepares a “weekly pressure sheet” for the CNAs based upon the doctor’s orders.

The Employers contend that the LPNs have the authority to determine, without approval, which CNA will be assigned to a particular resident and match a CNA’s “skills” to a resident. However, the record does not reflect that the CNAs possess any unique skills requiring assessment by LPNs. Thus, an LPN may, for example, send a CNA to help on the Medicare Unit because the CNA worked on that unit previously, but there is no evidence that residents’ needs or CNAs’ skills differ significantly within a particular unit. Moreover, both LPNs and CNAs are guided by and must follow the ICP and Employer Sunrise’s policies and procedures. The sporadic rotation of different tasks by the LPNs is more akin to an “ad hoc instruction that the employee perform a discrete task during the shift” and as such is insufficient to confer supervisory status. Croft Metals, slip op. at 7.

Moreover, assuming *arguendo* that the LPNs do “assign” CNAs to overall tasks as defined in Oakwood, I find that they do not exercise independent judgment in making such assignments. In Oakwood, the Board defined “independent judgment” as requiring

that “an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data,” provided that the act is “not of a merely routine or clerical nature.” Id., slip op. at 8. The Board also stated that “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” Oakwood, slip op. at 8. If, however, the employer’s policies allow for discretionary choices, the mere existence of these policies would not eliminate independent judgment from decision making. Id.

Thus, when an LPN tells a CNA that she needs help, for example, in changing a resident’s dressing, this is a routine and repetitive task. In addition, while an LPN may assign a CNA to a particular unit because the CNA has worked in that unit, the CNAs generally have permanent assignments, know their residents and have the skills to take care of their residents on their own. If a CNA is having trouble with a resident or if a CNA is having trouble transporting a resident to a location within the allotted time designated for the task, an LPN may temporarily reassign the CNA. However, there is no evidence that the LPN evaluates any special skills of the CNA in making these temporary changes because all of the CNAs basically have the same training and skills to perform such routine tasks. Notwithstanding the Employers’ reference to dissenting opinions in Loyalhanna Health Care Associates, 332 NLRB 933, 937 (2000) and Providence Hospital, 320 NLRB 717, 737-38 (1996), assignments based on an assessment of employee’s well known skills and abilities are routine in nature. Golden Crest, slip op. at 5, fn. 9 (charge nurses’ failure to make *individualized* assessments of CNAs’ skills in

relation to residents' needs, or other factors, in reassigning work to balance work loads reflects charge nurses are not statutory supervisors); Providence Hospital,⁸ 320 NLRB 717, 727 (1996); Clark Machine Corp., 308 NLRB 555, 555-556 (1992).

While LPNs may decide amongst themselves to temporarily assign CNAs to different units to cover staffing shortages, such assignments, made to equalize employees' workload and done on a rotational or other similar basis are routine assignments. In this regard, the Board, in Golden Crest, noted that reassignments to reflect a goal of balancing workloads did not require the use of independent judgment. Golden Crest, slip op. at 5, fn. 9; Cf. Harborside Healthcare, Inc., 330 NLRB 1334, 1337 (2000)(charge nurses who did not use any basis whatsoever, other than personal choice, to select staff to cover shortages when acting as shift supervisors on evenings and weekends found to be statutory supervisors); NLRB v. Quinnipiac College, 256 F.3d 68, 75 (2d.Cir. 2001)(shift supervisors who overrode dispatchers' assignments and directly called in employees found to be statutory supervisors). Moreover, both LPNs and CNAs are guided by and must follow the ICP and Employer Sunrise's policies and procedures. Thus, the judgment used by the LPNs is similar to instances which the Board in Oakwood determined did not involve the use of independent judgment, such as "assigning an available nurse fluent in American Sign Language to a patient who needs ASL to communicate or assignments made 'solely on the basis of equalizing workload'." Id., slip op. at 8-9. Similarly, while the Employers' claim that LPNs may assign CNAs to work with new CNAs by determining the "right match" in terms of skills and

⁸ In Oakwood, the Board overruled Providence Hospital and related cases only to the extent the decisions are inconsistent with Oakwood. Nothing in the Board's decision in Oakwood, Golden Crest, or Croft Metals is inconsistent with this aspect of Providence Hospital.

temperament, there is no indication that the CNAs possess any special skills or that anything other than the generally known temperament of the CNA is considered.

Finally, the LPNs' authority to request, but not force, a CNA to clock out, is insufficient to confer supervisory status. Golden Crest, slip op. at 4 ("The party seeking to establish supervisory authority must show that the putative supervisor has the ability to require that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority to merely request that a certain action be taken.").

Accordingly, I find that the LPNs do not "assign" work using independent judgment and that Employer Sunrise's established policies and procedures limit the LPNs' judgment to such a degree that it falls short of the judgment required to confer supervisory status.

V. LPNs Do Not Responsibly Direct the Work of CNAs Using Independent Judgment

LPNs use their expertise and judgment to assess residents' needs and assign CNAs routine tasks based upon the ICP and Employer Sunrise's policies and procedures. The LPNs and CNAs must follow the detailed ICP to provide resident care. The ICP specifies all the tasks that must be completed, and if the ICP is changed, the LPN communicates those changes to the CNA. Moreover, CNAs also report changes in a resident's condition to the LPN. CNAs perform most of the tasks in the ICP, and the LPN makes sure that the tasks are completed. If an LPN receives an order from a doctor to provide a resident a specific treatment such as increased fluid intake or exercises, the LPN instructs the CNA assigned to the resident to perform the task. In addition to the ICP, Employer Sunrise has a detailed job description for both LPNs and CNAs describing their duties and obligations. The LPN's job description specifically states that an LPN's

daily supervision of the day-to-day activities of a CNA must be in accordance with “federal, State, and local standards, guidelines, and regulations that govern [the] facility.”

In Oakwood, the Board gave meaning to the term “responsibly direct” as follows: “If a person on the shop floor has ‘men under him’, and if that person decides ‘what job shall be undertaken next or who shall do it’, that person is a supervisor, provided that the direction is both ‘responsible (as explained below) and carried out with independent judgment’.” Oakwood, slip op. at 6. The Board also held that “for the direction to be ‘responsible’, the person directing the performance of a task must be accountable for its performance.” Oakwood, slip op. at 6-7. The Board further stated: “to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take the steps.” Id., at 7, citing NLRB v. KDFW-TV, Inc., 790 F.2d 1273, 1278 (5th Cir. 1986).

As in Golden Crest, there is evidence that the LPNs have the authority to direct the CNAs by correcting CNAs when they are not providing adequate care and directing the CNAs to perform routine tasks when the LPN determines such tasks are necessary. However, the direction to perform these tasks is in accordance with Employer Sunrise’s procedures and policies, such as the ICP, safety and emergency procedures, further demonstrating that the use of independent judgment is not required. Although the LPNs may make some choices with respect to, for example, whether extra liquids are needed for a resident or if vital signs should be taken every 30 minutes, these determinations do not confer supervisory status. Oakwood, slip op. at 8. As in Croft Metals, the

Employers have failed to demonstrate that the degree of discretion in directing the CNAs rises above the merely routine or clerical. While the LPNs monitor resident care, the evidence does not indicate that the LPNs' directions to the CNAs in this regard rise above the routine or clerical. Croft Metals, slip op. at 8. Although the Employers also contend that the CNAs cannot do their jobs without constant direction from the LPNs, the record reflects that all CNAs are trained in restorative care and know how to do their jobs. In this regard, the LPNs do not typically observe the work performed by the CNAs because the CNAs are usually on permanent teams, and the CNAs know their residents' needs.

Regarding emergencies, the record shows that LPNs have been involved in situations such as fire alarms, bomb threats, and hurricanes, but these situations do not occur on a regular basis. Moreover, the Quality Care Assurance consultant testified that Employer Sunrise has specific emergency and safety procedures that must be followed in the event of a fire alarm or bomb threat. During these situations, the role of the LPN would be to assess the medical condition of the resident and make sure the resident was placed in the proper location according to the emergency procedure.⁹ Although the consultant testified that LPNs also direct CNAs during other "unusual circumstances" including skin tears or falls, the record reflects that the LPNs and CNAs work together to respond to these situations, and that they are involved in such routine matters as putting pads on side rails, lowering beds, and handling bed alarms. Cf. NLRB v. Quinnipiac College, 256 F. 3d 68, 75 (2d. Cir. 2001) (shift supervisors who regularly and independently assessed non-routine situations such as fire alarms and deployed staff to cover those situations were statutory supervisors).

⁹ The consultant testified that during Hurricane Andrew, which hit South Florida in 1992, LPNs were responsible for making sure that the additional residents brought to the facility were assigned to the CNAs and that the residents had a place within the facility.

Although the Employers also contend that LPNs can face adverse action if a unit manager's evaluation of an LPN indicates his or her supervision of a CNA is unsatisfactory, there is no evidence that the LPNs are held accountable in any way for their exercise of this authority. See Golden Crest, slip op. at 5. In this regard, the Employer submitted an evaluation of an LPN that states "Jennifer works well with her peers, supervises nursing assistants effectively". However, there is no evidence that the LPN's terms and conditions of employment would have been affected if the LPN failed to supervise CNAs effectively. Thus, the Employer has failed to present evidence of actual "accountability" rather than conclusionary evidence. Golden Crest, slip op. at 5 (there must be a "more-than-merely-paper showing" that a prospect of consequences exists to establish supervisory status); Avante at Wilson, Inc., 348 NLRB No. 71, slip op. at 2 (2006) (evidence lacking specificity is insufficient to establish supervisory status). Moreover, contrary to the Employers' argument, the record does not reflect that LPNs act as unit managers with any regularity so as to confer supervisory status. Oakwood, slip op. at 18 (employer failed to demonstrate that the rotating charge nurses served as supervisory charge nurses with any regularity so as to confer supervisory status).

VI. The Certifications in Cases 12-RC-8064 and 12-RC-8066 Should be Upheld

As I previously addressed on pages 16-17 of the SD, I re-affirm my finding that the elections for Employer Sunrise's service employees (Case 12-RC-8064) and Employer Health Care's housekeeping and maintenance employees (12-RC-8066) should not be set aside because two LPNs served as the Union's election observers for the LPN unit.

All three elections were held simultaneously, but each election had its own notice, ballot, ballot box, and observers. For the LPN unit, the Union chose two different LPNs for the two election sessions as their observers, and Employer Sunrise also chose an LPN to serve as its observer for the LPN unit. The housekeeping and laundry employees had their own observers during the election, and these employees are not supervised by the LPNs. Rather, Employer Health Care employs its own supervisors for the housekeeping and laundry employees.

At the time the elections were conducted, an employer's use of a supervisor or an individual closely aligned with management as an observer constituted objectionable conduct. Plant City Welding & Tank Co., 119 NLRB 131 (1957). In Family Service Agency, 331 NLRB 850 (2000), the Board overruled Plant City Welding and expanded objectionable conduct to include the use of a supervisor or an individual closely associated with management as an observer whether the observer was chosen by the employer or the union.

These elections were conducted more than three years before the Board's decision in Family Service Agency, and the Board noted that it had "no quarrel with the rationale underlying" the prior rule. In addition, Employer Sunrise itself chose an LPN to be its observer, and the LPNs were observers for the LPN unit only. Finally, Employer Sunrise did not object to the Union's use of LPNs as observers. In Liquid Transporters, Inc., 336 NLRB 420 (2001), the Board denied review of the employer's objection to the election that the union used a statutory supervisor as an election observer. The Board also stated "it is well-established Board law...that an employer must raise the alleged supervisory status of a union's election observer at the time of the preelection conference; otherwise,

any such objection is precluded, and the employer may not raise the issue for the first time in its post-election objections.” See also Monarch Building Supply, 276 NLRB 116 (1985); Mid-Continent Spring Co. of Kentucky, 273 NLRB 884, 887 (1984); and Howard Cooper Corp., 121 NLRB 959 (1958). Thus, the facts in this case mitigate against applying Family Service Agency retroactively in the instant case.

Although the Employers also argue that the LPNs are closely aligned with management, the record fails to establish any facts arguably showing a close alignment between the LPN observers and Employer Sunrise aside from the LPNs’ regular LPN duties. The Employers’ contention that LPNs are closely identified with management in the eyes of the employees in the other units because they work side-by-side with them, without more, is insufficient to warrant such a finding.

Accordingly, I find that even if the LPNs are found to be statutory supervisors, the elections in Cases 12-RC-8064 and 12-RC-8066 should not be set aside. The LPNs served as observers only in the LPN unit; the LPN observers were not even employed by Employer Health Care and thus the LPN observers had even less of a relationship to the employees in that unit; were not their supervisors; nearly 10 years have passed since the elections; the Petitioner was certified in these units nearly 8 years ago; Employer Sunrise itself chose an LPN observer; and the Employers did not object to the Union’s use of the LPN observers.

VII. Conclusion

Accordingly, I conclude that the LPNs in Case 12-RC-8065 do not “assign” or “responsibly direct” CNAs using “independent judgment” so as to make them statutory supervisors within the framework of the newly-issued Board cases. I further conclude

that the elections and certifications in all three units should be upheld, and that even if the LPNs are found to be statutory supervisors, the certifications in Cases 12-RC-8064 and 12-RC-8066 should be upheld and those cases handled separately from Case 12-RC-8065.

VIII. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision on Remand may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST on **January 24, 2007**. The request may not be filed by facsimile.¹⁰

DATED at Tampa, Florida, this 10th day of January, 2007.

Rochelle Kentov, Regional Director
National Labor Relations Board, Region 12
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¹⁰ The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board's office in Washington, D.C. If a party wishes to file the above-described document electronically, please refer to the enclosed policies and procedures for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlr.gov.